

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: Mustafa, J.A., Mwakasendo, J.A., and Makame, J.A.)

CRIMINAL APPEAL NO.27 OF 1981

BETWEEN

NYAMWERU NYAGALI } APPELLANTS
SWAIBU KILOMBA }

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction of the High Court
of Tanzania at Bukoba, Y. Rubama, J. dated the
8th day of January, 1981,

i n

Criminal Sessions Case No.38 of 1980

J U D G E M E N T

MUSTAFA, J.A.

Four persons were charged with the murder of the deceased; two were convicted as charged and two were acquitted. The two convicted were respectively 1st accused and 4th accused at the trial. We will continue to call them 1st accused Swaibu and 4th accused Nyamweru at this appeal.

The convictions were based solely on the alleged confession to the killing by the 4th accused. PW.2 Bryson stated that he heard the 4th accused tell how he, i.e. 4th accused together with the 3 other co-accused, killed the deceased and how the deceased was buried naked, with the club and rope used in killing the deceased. At the time of the confession, the 4th accused was at the scene with other villagers and he was being questioned from about 9.00 P.M. to 2.00 A.M. the following morning.

However, PW.1 who, according to PW.2 Bryson, was with PW.2 throughout, did not appear to have heard any confession by the 4th accused. PW.2 Bryson also said that a militia man, Nestory, was not present when the 4th accused made his confession. However, DW.3 Detective Constable Charles, testified that Nestory had told him that he, i.e. Nestory, was present when the 4th accused gave details as to how they killed the deceased.

The trial judge accepted the evidence of PW.2 Bryson and held that the confession was made by 4th accused and the confession implicated all the other 3 co-accused. The trial judge also held that the confession was made when Nestory was absent, and was therefore admissible.

However, we cannot discount the evidence of PW.3 when he stated that Nestory had told him that he, i.e. Nestory was present when the 4th accused confessed. Nestory himself gave evidence as DW.5, but he was declared hostile and we will ignore his evidence.

We cannot say with any conviction that the confession was made in the absence of Nestory. We think that it was quite possible that Nestory was present and that PW.2 had overlooked that fact. The confession of 4th accused is therefore inadmissible under Section 27 of the Evidence Act as ^{Nestory} is under the rank of a corporal. However, in terms of section 31 of the Evidence Act, certain facts were discovered in consequence of the information received from 4th accused. The 4th accused had stated that the deceased body was buried naked, with a club and rope near him. When PW.2 and other villagers dug up the body of the deceased it was found to be naked and a club and a rope were found by the deceased's side. This part of the confession was admissible. Only a person actively implicated in the killing of the deceased could have knowledge of these facts. The deceased died as a result of a fracture on his skull. The 4th accused had alleged that the prosecution witnesses had told lies against him.

In our view, the 4th accused Nyamweru must be implicated in the killing of the deceased as otherwise he could not possibly have known of the deceased being buried naked with a club and a piece of rope by his side. We think that his conviction for murder is justified and we dismiss his appeal.

As regards 1st accused Swaibu, the only evidence against him is in the inadmissible confession of 4th accused. There is therefore no evidence to convict him. We allow his appeal, quash his conviction, set aside the sentence of death passed on him and order that he be released forthwith unless otherwise legally detained.

Date: 31st day of May, 1962.

A. MUSTAFA
JUSTICE OF APPEAL

Y. M. M. MAKASENDO
JUSTICE OF APPEAL

T. L. M. MAKAME
JUSTICE OF APPEAL

certify that this is a true copy of the original.